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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1436

UNITED STATES OF AMERICA,
Petitioner,

v.

R. ENTERPRISES, INC. and
MFR COURT STREET BOOKS, INC.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF OF AMICUS CURIAE PHE, INC., IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS*[1]

PHE, Inc. ("PHE") is a North Carolina corporation that is engaged, with sister corporations, in the business of mailing throughout the Nation various materials protected by the First Amendment, including sexually explicit magazines and videotapes, materials advocating the use of contraceptives, a medical newsletter (edited by a physician) entitled *Sex Over Forty*, and a newspaper entitled *Executive Health Report*. PHE's sexually explicit speech is sent only to adults, and only on request.

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[1] Petitioner and respondents both have consented to the filing of this *amicus* brief. Their letters of consent are being lodged with the Clerk.

PHE has taken great care to assure compliance with state and federal obscenity laws. In addition to conducting rigorous screening procedures, including review and approval of all sexually explicit materials by independent psychologists, psychiatrists and sociologists, the company has met with law enforcement officials and sought their advice to ensure that no obscene material is distributed by PHE. PHE has strictly abided by the advice it has received.

Despite these efforts, PHE has been the target of inquiry by various federal prosecutors across the country for possible violations of the federal obscenity laws. PHE recently obtained a preliminary injunction barring the Department of Justice's National Obscenity Enforcement Unit from pursuing simultaneous prosecutions against PHE in multiple jurisdictions. The injunction was based on a *prima facie* showing that the government was acting in bad faith calculated to suppress PHE's constitutionally protected activities. *PHE, Inc. v. United States Department of Justice*, Civ. Action No. 90-0693 (D.D.C. July 23, 1990).

One jurisdiction in which the Department has threatened to bring an indictment against PHE is the Western District of Kentucky. On January 30, 1990, a federal grand jury, working with federal prosecutors in the District, issued to PHE a subpoena to produce certain films, magazines and corporate records. The government withdrew the subpoena, after PHE moved to quash under Rule 17(c) of the Federal Rules of Criminal Procedure. On April 26, 1990, however, PHE was served with a second grand jury subpoena, which differs only slightly from the previous subpoena. Although it no longer seeks specific expressive materials, the subpoena demands production of numerous documents relating to the acquisition and distribution of 10 named films and 9 specific magazines. In addition, the subpoena requires PHE to produce essentially all of its business records, including correspondence with customers and organizations. Invoking Rule 17(c) and the First and Fourth Amendments to the Constitution, PHE has again moved to quash the subpoena. In support of its motion, PHE maintains, *inter alia*, that the subpoena impermissibly chills its First Amendment rights. The District Court for the Western District of Kentucky, recognizing the similarities between the subpoenas at issue there and in this case, has decided to defer ruling on PHE's motion to quash pending the Court's determination in this case. *See In re Grand Jury Subpoena Duces Tecum Served upon PHE, Inc.*, Order (W. D. Ky. Aug. 21, 1990). Thus, *amicus* has a substantial interest in the outcome of this case.

PHE's experience has made it acutely aware of the threat to free expression posed by the federal government's tactics in investigating obscenity charges. As a nationwide distributor of expressive materials, PHE is concerned and deeply affected by government investigative practices that burden its rights or the rights of others to engage in expressive conduct. It wishes to participate in this case to explain the narrow and reasonable basis of the court of appeals' decision under review, and to highlight the First Amendment concerns raised by grand jury subpoenas directed at speakers under investigation for possible commission of speech-related crimes.

SUMMARY OF ARGUMENT

The court of appeals utilized the correct standard in analyzing respondents' claim that the grand jury subpoenas requesting their corporate documents should be quashed pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure. Rule 17(c)'s prohibition on "unreasonable" subpoenas dictates that the evidence sought be relevant to a legitimate grand jury investigation. Consistent with the approach adopted by the majority of other circuits that have addressed the issue, the court of appeals held that when the recipient of a grand jury subpoena duces tecum makes a substantial showing that the material demanded is not relevant to the grand jury's investigation, the government must then produce some evidence of relevance in order to compel compliance with the subpoena. This distribution of burdens strikes the appropriate balance between the effective functioning of the grand jury and the recipient's right to be protected from unreasonable grand jury subpoenas.

The court of appeals correctly applied this analysis in this case. Respondents satisfied their initial burden of demonstrating to the court that the subpoenaed documents are unlikely to have any relevance to the grand jury's investigation into possible obscenity violations in Virginia. The government made no showing in response. Accordingly, the subpoena was correctly quashed. Point I.A.

The court of appeals' statements regarding the necessity under Rule 17(c) that subpoenaed material be admissible at trial is merely dictum. The court's disposition of Model Magazine Distributor's motion to quash makes clear that the court does not require the government to make a threshold showing of admissibility. Moreover, the potential admissibility of the documents requested of respondents had no bearing on the court's holding under review. Point I.B.

If this Court rules that a grand jury subpoena can survive a motion to quash when the government makes no showing of relevance whatsoever, despite respondents' substantial initial showing of irrelevance, reversal is nonetheless inappropriate. Respondents, who are engaged in constitutionally protected expressive activities, raise a valid First Amendment claim. This Court has repeatedly instructed that the government cannot pursue criminal (especially obscenity) investigations in a manner that would abridge First Amendment rights, even if identical techniques are permissible in other contexts. There is no exception for grand jury investigative tools, such as subpoenas duces tecum. Where the recipient of a grand jury subpoena makes a prima facie showing that the subpoena would likely infringe First Amendment rights, the government must then demonstrate that the subpoena is substantially related to a compelling governmental interest and burdens those rights no more than is necessary. Point II.A.

A subpoena duces tecum issued in connection with a grand jury investigating possible violations of obscenity laws could abridge the recipient's First Amendment rights in numerous ways. For example, a subpoena demanding production of specified sexually oriented expressive materials, without a prior finding that they are (or are likely to be) obscene, is likely to chill the recipient's constitutional right to distribute materials presumptively protected by the First Amendment. A subpoena requesting business records directly related to specified sexually oriented expressive materials will likely have the same effect. If the subpoena of corporate documents is so broad that production would interfere significantly with the recipient's ability to engage in expressive activities, the First Amendment prohibition against prior restraints would be implicated. A recipient's prima facie showing that any of these infringements is likely to result from a grand jury subpoena triggers compelling-interest analysis. Point II.B.

Because the court of appeals did not reach respondents' First Amendment claim, it did not decide whether respondents have made the requisite prima facie showing. Accordingly, the appropriate course of action—if the Court rules that Rule 17 does not require any showing of relevance from the government—is to remand to the court of appeals for consideration of respondents' First Amendment objections to the subpoenas. Point II.C.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT BECAUSE RESPONDENTS MADE A SUBSTANTIAL SHOWING THAT THE SUBPOENAED MATERIAL WAS IRRELEVANT TO THE GRAND JURY INVESTIGATION, AND THE GOVERNMENT THEN FAILED TO MAKE *ANY* SHOWING OF RELEVANCE, THE GOVERNMENT FAILED TO MEET ITS OBLIGATION UNDER RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE TO DEMONSTRATE THE RELEVANCE OF THE SUBPOENAED DOCUMENTS.

The federal grand jury's "investigative powers are necessarily broad," *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972), but they are "not unlimited," *United States v. Dionisio*, 410 U.S. 1, 9 (1973). The grand jury does not have unbridled discretion to compel the production of evidence.[2] Both the Fourth Amendment and Rule 17(c) of the Federal Rules of Criminal Procedure prohibit "unreasonable" subpoenas. *Hale v. Henkel*, 201 U.S. 43, 73 (1906). The "reasonableness" standard imposes different limitations on grand jury subpoenas, depending upon the context. But as this Court's decisions demonstrate, it at least requires that the evidence sought be relevant to a legitimate grand jury investigation.[3] No court has upheld grand jury fishing expeditions undertaken in the mere hope that incriminating evidence will surface.

[2] For example, grand jury subpoenas are subject to challenge for overbreadth. *See, e.g., Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946); *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1297-1298 (4th Cir. 1987); *In re Grand Jury Proceedings*, 601 F.2d 162 (5th Cir. 1979).

In *Zurcher v. Stanford Daily*, for example, the Court observed that an investigatory subpoena is justified and can withstand a motion to quash *if* the material demanded is "sufficiently relevant." 436 U.S. 547, 567 (1978). The Court noted that this showing would "very likely" be made if the evidence sought is "sufficiently connected with the crime to satisfy the [warrant] probable-cause requirement." *Id.* Similarly, in *Branzburg v. Hayes*, the Court held that a newsman subpoenaed to testify before a grand jury must appear and answer questions put to him, but "subject of course, to the supervision of the presiding judge as to . . . the pertinence of the probable testimony." 408 U.S. at 709 (internal quotes omitted). And in *Hale*, the Court concluded that a grand jury subpoena duces tecum that is unnecessarily sweeping in its scope is unreasonable. 201 U.S. at 76. To subpoena massive amounts of corporate documents, the Court held, the *government* must show "some necessity" to "the prosecution of [the] case" or "some evidence of their materiality." *Id.* at 77.[4]

[3] Petitioner's suggestion that Rule 17(c) focuses only on the burdensomeness of production under a challenged subpoena misses the mark. *See* Pet. Br. at 18. Rule 17(c)'s authorization to quash a subpoena if compliance would be "oppressive" does address this aspect of improper subpoenas. But the "reasonableness" standard, like that derived from the Fourth Amendment, focuses on other concerns, as well. For example, it requires that the subpoena specify the materials to be produced with sufficient particularity, and seek materials covering only a reasonable period of time. *See, e.g., Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 209.

[4] In discussing the constraints imposed by the Fourth Amendment on investigatory subpoenas issued by the Federal Trade Commission, the Court in *Federal Trade Commission v. American Tobacco Co.* remarked that "[i]t is contrary to the first principles

In the portion of its decision under review, the court of appeals held only that under Rule 17(c), when the recipient of a grand jury subpoena duces tecum makes a substantial initial showing that the material demanded is not relevant to the grand jury's investigation, the government must then produce "some evidence" of relevance in order to compel compliance with the subpoena. *In re Grand Jury 87-3 Subpoena Duces Tecum*, 884 F.2d 772, 777 (4th Cir. 1989).

Perhaps because the actual holding of the court of appeals does not present any issue worthy of review, petitioner consistently mischaracterizes the court of appeals' holding, in several key respects. First, petitioner incorrectly argues that the court of appeals required the government to make a "threshold showing" of relevance. Pet. Br. at 23. Second, petitioner inaccurately argues that the standard established by the court is one of "trial relevance." *Id.* at 26. Third, petitioner mistakenly describes the court's holding as obligating the government to demonstrate that the information sought will be *admissible* at a future trial. *E.g.*, *id.* at 5. In fact, however, the court of appeals' holding is much narrower than that, and is entirely consistent with the "majority rule" endorsed by petitioner.[5] The court's decision establishes the appropriate standard for resolving a claim that the material demanded by the grand jury is irrelevant, and that compelled compliance with the subpoena would therefore be "unreasonable or oppressive" under Rule 17(c).

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of justice to allow a search through all [a corporation's] records, relevant or irrelevant, in the hope that something will turn up." 264 U.S. 298, 306 (1924). *See also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (the information sought by an administrative subpoena must be "reasonably relevant"). The powers of the FTC are analogous to those of a grand jury. *Id.* at 652-653.

[5] For this reason, the Court may properly decide to dismiss the writ of certiorari as improvidently granted. *See, e.g., Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645, 1649-1650 (1988); *Miskkin v. New York*, 383 U.S. 502, 512-514 (1966).

A. The Rule Established and Properly Applied by the Court of Appeals Is Consistent with the Rule Applied by the Majority of Other Circuits and with Principles Announced by This Court.

Petitioner incorrectly argues that "[l]ike the rule in the Third and Tenth Circuits, the Fourth Circuit's decision in the present case imposes a *threshold obligation* on the government to establish the relevance of the subpoenaed records." Pet. Br. at 23 (emphasis added). This purported obligation can be located nowhere in the language or holding of the court. Unlike the Third Circuit, which has explicitly stated that the government must make a *preliminary* showing of relevance in *every case* in which a grand jury subpoena duces tecum is resisted, *e.g.*, *United States v. Oliva*, 611 F.2d 23, 24-25 (3d Cir. 1979),[6] the Fourth Circuit did not explain when the government's obligation to demonstrate some relevance is triggered. However, the court of appeals' actual holding demonstrates that this obligation arises only *after* the recipient of the subpoena makes a substantial showing that the material sought is not relevant to a legitimate grand jury investigation, because that is the precise context in which the court made its decision. Respondents *had* submitted affidavits and other evidence that de-

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[6] The Third Circuit has imposed a rule requiring the government "to make some *preliminary* showing by affidavit that each item [sought in the subpoena] is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 93 (3d Cir. 1973) (emphasis added). *See also Matter of Grand Jury Subpoena Duces Tecum Issued on June 9, 1982*, 697 F.2d 277, 281 (10th Cir. 1983) (adopting "Schofield" rule). The Third Circuit has explained that it is enforcement proceedings—either civil contempt proceedings under 28 U.S.C. § 1826(a) or motions to quash under Rule 17(c)—that give rise to the government's obligation in that court to file a "Schofield" affidavit. *In re Grand Jury Proceedings (Harrisburg Grand Jury)*, 658 F.2d 211, 215 n.3 (3d Cir. 1981); *In re Grand Jury Empanelled October 18, 1979 (Hughes)*, 633 F.2d 282, 287 (3d Cir. 1980).

nied any connection between the companies and Virginia, and that evidence convinced the court (absent any contrary showing by the government) that the records of those companies were not "relevant to a grand jury investigation in the Eastern District of that state." 884 F.2d at 777.

Indeed, the court of appeals' decision in this very case regarding Model Magazine Distributor's motion to quash clearly and fatally undermines petitioner's characterization of the "rule" established by the court. Unlike respondents, Model did not make a sufficient showing to convince the court that the documents subpoenaed from it were irrelevant. The court therefore affirmed the district court's refusal to quash the subpoena requesting Model's corporate records *even though* the government had made absolutely no threshold showing of the relevance of those documents to the grand jury's investigation. *See* 884 F.2d at 776. Clearly, in the Fourth Circuit, the government's obligation to demonstrate some relevance is not triggered until the recipient makes an initial showing to the court that the material demanded is or is likely to be irrelevant.

Moreover, as the court of appeals' repeated statements and specific holdings make clear, the government's obligation is then merely to provide some evidence of "the relevancy of [the requested material] *to the grand jury's investigation*," 884 F.2d at 776 (emphasis added). *See id.* (finding that the documents requested of Model are relevant "to this investigation"); *id.* 777 (holding that the government had not shown that the documents requested of respondents are "relevant to a grand jury investigation"). Under the Fourth Circuit's holding, the government need *not* "prove that the requested documents are relevant . . . to the likely charges at trial"—as petitioner asserts. Pet. Br. at 23.

The Fourth Circuit's holding is entirely consistent with the approach adopted by other circuits. With the exception of the Third and Tenth Circuits, which have exercised

their *supervisory* powers to impose a threshold obligation on the government,[7] courts have placed the initial burden on the subpoena recipient to make a showing of irrelevance before the government must respond with some showing that the grand jury is seeking relevant evidence. *See* 2 S. Beale & W. Bryson, Grand Jury Law and Practice, § 6:28 at 184 & n.12 (1986 & Supp. 1989).[8] The

[7] The Third Circuit imposed the "Schofield" affidavit requirement under its "supervisory power over the grand jury and over the district court's enforcement of subpoenas." *In re Grand Jury Proceedings (Schoefield II)*, 507 F.2d 963, 966 (3d Cir. 1975), *cert. denied*, 421 U.S. 1015 (1975). *Accord id.* at 964 & n.2; *Schofield I*, 468 F.2d at 93; *Harrisburg Grand Jury*, 658 F.2d at 213 (declining to extend "Schofield" rule to subpoenas to appear before a grand jury or to criminal contempt proceedings). With the exception of the Tenth Circuit, all other circuits that have addressed the issue have declined to exercise their supervisory power to impose such a threshold obligation. *See* cases cited in Pet. Br. at 22 n.17.

Despite petitioner's attempts to motivate this Court to overrule *Schofield* and its progeny, the question of whether the Third Circuit may exercise its supervisory power to specify the particular way in which relevancy and proper purpose of a grand jury investigation shall be shown in that circuit is not properly before this Court. In the decision under review, the Fourth Circuit did not purport to act pursuant to its supervisory authority; it invoked only Rule 17(c). Indeed, there may be reason to believe that the court would not exercise its supervisory power to adopt the "Schofield" rule. *See Re Special Grand Jury No. 81-1 (Harvey)*, 697 F.2d 112 (4th Cir. 1982) (*en banc*), vacating 676 F.2d 1005 (4th Cir. 1980) (which imposed a "Schofield" obligation in response to a claim of attorney-client privilege). The Court should review the propriety of the "Schofield" supervisory doctrine only in a case in which the doctrine has been applied.

[8] The Fifth and Eleventh Circuits, for example, have declined to require a "Schofield" affidavit, or similar showing, unless the subpoena recipient makes some showing of "harrassment or prosecutorial misuse of the system." *In re Grand Jury Investigation (McLean)*, 565 F.2d 318, 320 (1977); *In re Grand Jury Proceedings (Guerrero)*, 567 F.2d 281, 283 (1978). *See also In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384, 1387 & n.4 (11th Cir. 1982) (adopting Fifth Circuit approach), *cert. denied*, 462 U.S. 1119 (1983). The Ninth Circuit has said that it will not adopt the

"majority rule"—which petitioner advocates, Pet. Br. at 16—requires the government to make some showing of relevance once the recipient meets his initial burden. Under the majority rule, once the recipient makes an initial showing of irrelevance, the government is not entitled to stand mute and make *no* showing of relevance—as it steadfastly maintained in this case below—and still compel production.

For example, under the majority rule, as applied in the Second Circuit, if the recipient of the subpoena "come[s] forward with enough information to prove that it is unlikely that the materials sought are relevant to the investigation," he has "shift[ed] the burden to the government" to show the relevance of the requested material. *In re Grand Jury Subpoena Duces Tecum to John Doe Corp.*, 570 F. Supp. 1476, 1480 (S.D.N.Y. 1983), relying upon *In re Horowitz*, 482 F.2d 72, 80 (2d Cir. 1973) (holding that where there is reason to doubt the relevance of the subpoenaed documents, "the government must make a minimal showing that, in light of other evidence that has been obtained, the [material] may be relevant to the grand jury's investigation of a federal crime"), *cert. denied*, 414 U.S. 867 (1973).[9] The Sixth Circuit follows a similar rule: the government must "make a

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Third Circuit's "Schofield" rule, *e.g.*, *In re Grand Jury Proceedings*, 721 F.2d 1221, 1223 (1983), but has not addressed the issue of what the proper rule is where the subpoena recipient makes an initial showing that the information sought is likely not relevant.

[9] Under the Second Circuit's approach, "[i]f the [recipient] does not come forward with enough evidence to shift the burden, then the [recipient] bears the burden of showing that the documents sought 'can have no conceivable relevance to any legitimate object of investigation by the federal grand jury.'" *In re Grand Jury Subpoena Duces Tecum to John Doe Corp.*, 570 F. Supp. at 1480, quoting *In re Horowitz*, 482 F.2d at 80, and citing *In re Grand Jury Subpoena Served Upon New York Law School*, 448 F. Supp. 822, 823 (S.D.N.Y. 1978) and *In re Morgan*, 377 F. Supp. 281, 284 (S.D.N.Y. 1974). *See In re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978).

showing that the information sought is minimally relevant to the grand jury investigation [once] the party who seeks to quash the subpoena makes a showing of irrelevancy or prosecutorial abuse." *In re Grand Jury Proceedings, John Doe (Weiner)*, 754 F.2d 154, 155 (6th Cir. 1985.)[10]

In light of the presumption of regularity generally recognized as attaching to actions of the grand jury,[11] it is appropriate to place the *initial* burden on the recipient to challenge a subpoena duces tecum on relevancy grounds. If the recipient can overcome this presumption, however, by demonstrating to the court that "it is unlikely that the materials sought are relevant to the investigation," then the burden properly shifts to the government to make *some showing* of relevance. If the information sought is conceivably relevant to some legitimate inquiry of the grand jury, the government should easily be able to meet that minimal burden.[12] The threshold showing required of the subpoena recipient is formidable, whereas the re-

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[10] *See also In re Grand Jury Subpoena (Battle)*, 748 F.2d 327, 330 (6th Cir. 1984) (holding that after the objector makes a showing "that the information sought bears no conceivable relevance to any legitimate object of investigation by the federal grand jury, . . . the Government [is] required to make a minimal showing of the relevancy of [the] subpoenaed evidence") (internal quotes omitted), citing *In re Horowitz*, 482 F.2d at 79-80, and *In re Liberatore*, 574 F.2d at 82-83.

[11] *See, e.g., United States v. Lisinski*, 728 F.2d 887, 893 (7th Cir.), *cert. denied*, 469 U.S. 832 (1984); *see also Hamling v. United States*, 418 U.S. 87, 139 n.23 (1974).

[12] A rule that would require the recipient to prove that "the documents lack any conceivable relevance to a legitimate subject of grand jury investigation," as petitioner suggests, Pet. Br. at 17, would be unnecessarily stringent. It would force the party with the least amount of information concerning the grand jury's investigations and possible federal crimes at issue to prove a negative. This Court has not hesitated to place burdens on the government in similar contexts. *See Hale v. Henkel*, 210 U.S. at 77.

sponsive burden placed on the government is minimal.[13] This distribution of burdens adequately discourages the proliferation of disruptive "minitrials and preliminary showings," eschewed by the Court, *United States v. Dionisio*, 410 U.S. at 17, while protecting the recipient from unreasonable grand jury subpoenas.

The Fourth Circuit correctly applied this analysis in this case. Respondents satisfied their initial burden of showing, with evidence, that the subpoenaed material was unlikely to have any relevance to the grand jury proceeding. At that point, the burden shifted to the government to make some minimal showing of relevance. Although petitioner seeks to undermine the court's refusal to compel compliance by *now* arguing the potential relevance of the material, it made none of those arguments below. The government offered no showing whatsoever. In these circumstances, the court correctly held that the government had failed to meet its burden and the subpoena must be quashed.

B. The Fourth Circuit's Language, In Dictum, Regarding the Admissibility of the Subpoenaed Documents Had No Bearing on Its Judgment.

Petitioner ardently attacks the court of appeals' purported adoption of a rule that a grand jury subpoena duces tecum can be enforced only if the government makes

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[13] The government need not demonstrate that the grand jury has a firm basis to believe that the evidence will, in fact, provide proof of the commission of a particular crime. *Cf. Blair v. United States*, 250 U.S. 273, 281 (1919). The government need only show that there is a possibility that the material will expose evidence of the commission of a federal crime. One of the cases relied upon by petitioner explains that the government has the burden of establishing (1) the existence of a grand jury investigation; (2) the generic nature and subject matter of that investigation; and (3) the fact that the subpoenaed documents bear a general relation to that subject matter. *In re Grand Jury Subpoenas Duces Tecum Addressed to Certain Executive Officers of M.G. Allen & Assoc.*, 391 F. Supp. 991, 997 (D.R.I. 1975).

a threshold showing that the requested documents would be admissible at trial. This "rule" cannot be gleaned from the court's holding, however. To the contrary, the court upheld the district court's refusal to quash the subpoena requesting Model's corporate records, even though there had been no showing whatsoever by the government that the documents would be admissible at trial; nor did the court find them admissible. *See* 884 F.2d at 776.

The court did opine that "any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Id.* at 777. But this statement—whatever its meaning—is merely dictum. Contrary to petitioner's contention, the court did *not* hold that the grand jury subpoena of respondents' corporate documents should be quashed because the documents would be inadmissible at trial. Indeed, the court did not even reach that conclusion. Rather, it simply "note[d]" that the documents would "most likely" be inadmissible. *Id.*

This Court "'reviews judgments, not statements in opinions.'" *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978), quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). The Court "look[s] beyond the broad sweep of the language and determine[s] . . . precisely the ground on which the judgment rests." *Black v. Cutter Laboratories*, 351 U.S. at 298. The court's actual holding in the portion of its decision under review rests *solely* on its conclusion that the government failed to sustain its burden of demonstrating "the relevancy of [respondents' corporate] documents to the grand jury's investigation." 884 F.2d at 776 (describing this as the court's "only concern"); *id.* at 774 (explaining that it "find[s] . . . that the government failed to demonstrate the relevance of [respondents'] corporate records" and reverses the district court "[f]or these reasons"). Whatever disagreement petitioner and this Court might have with the Fourth Circuit's dictum regarding the admissi-

bility at trial of the documents sought by the grand jury,[14] it does not require reversal in this case.

II. IF THE RECIPIENT OF A GRAND JURY SUBPOENA DUCES TECUM MAKES A PRIMA FACIE SHOWING THAT THE SUBPOENA IS LIKELY TO ABRIDGE ITS FIRST AMENDMENT RIGHTS, THE GOVERNMENT MUST THEN DEMONSTRATE THAT THE INFRINGEMENT IS NECESSARY TO FURTHER A COMPELLING GOVERNMENTAL INTEREST AND THAT THERE IS A SUBSTANTIAL RELATIONSHIP BETWEEN THE SUBPOENAED INFORMATION AND A LEGITIMATE GOVERNMENTAL GOAL.

Even if this Court were to rule that under Rule 17(c) of the Federal Rules of Criminal Procedure the government need make no showing of relevance whatsoever even though respondents had made an initial showing that the subpoenaed material is likely to be irrelevant to the grand jury's investigation, reversal would nonetheless be inappropriate. Whatever standard is applicable to enforcement of grand jury subpoenas under Rule 17, or in ordinary contexts, stricter standards pertain where compelled production would be likely to infringe First Amendment rights. Subpoenas—such as those at issue here—to produce material directly related to First Amendment activity, and that arise out of a federal grand jury investigation concerning the distribution of possibly obscene materials, raise significant First Amendment concerns.[15] If this Court reverses the court of appeals' holding founded on Rule 17, it must remand for consideration of respondents' First Amendment challenge to the subpoenas.

[14] *Amicus* does not advocate the adoption of a strict rule of admissibility regarding material subpoenaed by a federal grand jury. However, *amicus* notes that the legislative history of Rule 17 touted by petitioner, *see* Pet. Br. 19-20, did not hinder the Court in imposing an admissibility requirement for pretrial subpoenas in *United States v. Nixon*, 418 U.S. 683 (1974).

[15] In the District Court and on appeal, respondents squarely argued that compliance with the subpoenas for their corporate records would infringe their First Amendment rights. The court of appeals did not reach this issue. Nevertheless, in this Court, respondents may urge any ground to support the court's judgment whether or not it was relied upon or considered below. *See, e.g., United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984).

A. Where A Grand Jury Subpoena Would Likely Infringe First Amendment Rights, the Government Must Demonstrate That the Subpoena Is Substantially Related to a Compelling Governmental Interest and Burdens Those Rights No More Than Is Necessary.

Respondents are engaged in constitutionally protected expressive activities. MFR Court Street Books is a small retail bookstore; R. Enterprises distributes videotapes. The sexually oriented books, videotapes, and other expressive material respondents distribute, including the materials on which the grand jury is focusing, have not been adjudged obscene and thus are presumptively protected by the First Amendment.[16] Booksellers and other distributors have a First Amendment right to sell expressive materials containing sexually explicit descriptions and images, so long as the works taken as a whole are not obscene or otherwise unprotected. *See Miller v. California*, 413 U.S. 15 (1973). The "constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication." *Bantam Books, Inc. v. Sul-*

[16] Only a small portion of sexually oriented expression falls within the narrow category of constitutionally unprotected obscenity defined in *Miller v. California*. *See* 413 U.S. 15, 24 (1973). As this Court's careful delimitation of obscenity makes clear, "sex and obscenity are not synonymous." *Roth v. United States*, 354 U.S. 476, 487 (1957). Rather,

> [s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. *Id.*

livan, 372 U.S. 58, 65 n.6 (1963) (citation omitted). *See FW/PBS v. City of Dallas*, 110 S. Ct. 596 (1990) (sale, exhibition, and distribution of sexually oriented expressive material is presumptively protected by the First Amendment); *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829, 2836 (1989) (sale to adults of materials containing indecent but not obscene sexual expression is protected by the First Amendment); *Smith v. California*, 361 U.S. 147, 152 (1959) (state has no power to "restrict the dissemination of books which are not obscene"); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (distribution of expressive material is constitutionally protected).

This constitutional guarantee requires that the government not pursue obscenity investigations in a manner that would abridge First Amendment rights, even if identical investigative techniques would be permissible in other contexts. Thus, this Court has held that searches and seizures, when applied to expressive materials, are subject to more stringent procedural safeguards than the identical governmental tools applied to non-expressive materials, such as drugs, where no First Amendment concerns are raised. *See, e.g., A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211-212 (1964) (holding that standards governing searches and seizures of allegedly obscene books differ from those applied to other forms of contraband); *Marcus v. Search Warrant of Property*, 367 U.S. 717, 731 (1961) ("a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech"); *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) (holding that special rules apply to seizure of allegedly obscene material incident to arrest, explaining that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material"). *See also Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (where First Amendment interests are

at stake, "the requirements of the Fourth Amendment must be applied with scrupulous exactitude") (internal quotes omitted).

The same principles apply to investigative techniques employed by a grand jury.[17] As this Court recently made clear, "the invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections.'" *Butterworth v. Smith*, 110 S. Ct. 1376, 1380 (1990), quoting *United States v. Dionisio*, 410 U.S. at 11. The Court has consistently instructed that "grand juries are expected to 'operate within the limits of the First Amendment.'" *Id.*, quoting *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972). *See also Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963) (holding that government must make a compelling-interest showing where compliance with legislative investigative subpoena of business records intrudes upon First Amendment right to free association).

The fact that the grand jury subpoena does not seek to restrict First Amendment rights directly "does not end inquiry into the *effect* of the production order. . . . In the domain of these indispensible liberties, whether of

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[17] In its investigatory capacity, the grand jury basically functions as a law enforcement agency. Grand jury subpoenas are essentially instrumentalities of the United States Attorney's office (or some other investigative or prosecutorial department of the Executive Branch). *See United States v. Martino*, 825 F.2d 754, 761 (3d Cir. 1987); *Doe v. DiGenova*, 779 F.2d 74, 80 (D.C. Cir. 1985); *United States v. Cleary*, 265 F.2d 459, 461 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959). Subpoenas are issued in blank form by the clerk of the court under the court's name, so that the U.S. Attorney may simply fill them in. *See* Fed. R. Crim. P. 17(a). Federal prosecutors have the responsibility for deciding what evidence is subpoenaed. S. Beale & W. Bryson, *Grand Jury Law and Practice*, § 6:10 at 60 (1986 & Supp. 1989). *E.g., United States v. Santucci*, 674 F.2d 624, 627 (7th Cir. 1982), *cert. denied*, 459 U.S. 1109 (1983); *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519, 522-523 (E.D. N.Y. 1974) (citing cases). Indeed, the grand jury does not necessarily approve or even have knowledge of a subpoena prior to its issuance. *Doe v. DiGenova*, 779 F.2d at 80.

speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (emphasis added). *Accord, University of Pennsylvania v. EEOC*, 110 S. Ct. 577, 587 (1990) (agency subpoena duces tecum demanding university records); *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976).

Where grand jury activities are likely to abridge First Amendment rights—even indirectly—the court must balance those rights against the government's asserted interests. *Butterworth v. Smith*, 110 S. Ct. at 1380, citing *Branzburg v. Hayes*, 408 U.S. at 690-691; *Branzburg v. Hayes*, 408 U.S. at 710 (Powell, J., concurring); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. at 545.[18] To justify enforcement of a grand jury subpoena that is likely to abridge First Amendment rights, the government must demonstrate a compelling interest, *NAACP v. Alabama*, 357 U.S. at 463, and a substantial relationship between the material sought and that interest, *id.* at 464. *See Pollard v. Roberts*, 283 F. Supp. 248, 256-257 (E.D. Ark.) (three-judge court), *aff'd*, 393 U.S. 12 (1968) (*per curiam*). As this Court has explained,

> [I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the [government] convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.

[18] *See also, e.g., SEC v. MacGoff*, 647 F.2d 185, 191 (D.C. Cir.) (citing *Branzburg v. Hayes* and *Zurcher v. Stanford Daily*, and holding that in order to accommodate First Amendment rights of freedom of the press and of association, administrative subpoena requesting business records from newspaper publisher cannot include documentation relating to "editorial policy" or news gathering), *cert. denied*, 452 U.S. 963 (1981).

Gibson v. Florida Legislative Investigation Comm., 372 U.S. at 546. Moreover, "justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." *Branzburg v. Hayes*, 408 U.S. at 680-681.[19] The investigation must proceed "step by step . . . [and] an adequate foundation for inquiry must be laid before proceeding in such manner as" may inhibit First Amendment freedoms. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. at 557. *See also Shelton v. Tucker*, 364 U.S. 469, 488-490 (1960).

This compelling-interest analysis is necessary whenever the subpoena recipient makes a prima facie showing that compelled production "has the potential for substantially infringing the exercise of First Amendment rights." *Buckley v. Valeo*, 424 U.S. at 66.[20] Requiring the govern-

[19] *See In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-1103 (2d Cir. 1985) (grand jury subpoena to appear and testify implicating First Amendment right to freedom of association); *In re Grand Jury Subpoena to First Nat'l Bank, Englewood, Colo.*, 701 F.2d 115, 117 (10th Cir. 1983) (grand jury subpoena duces tecum implicating right to freedom of association); *Local 1814, Int'n'l Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267, 270-271 (2d Cir. 1981) (agency investigative subpoena duces tecum implicating right to freedom of association); *United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980) ("when the one summoned has shown a likely infringement of First Amendment rights, the enforcing courts must carefully consider the evidence of such an effect to determine if the government has shown a need for the material sought"); *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972) (grand jury subpoena to appear and testify implicating First Amendment rights to freedom of the press and to association). *See also SEC v. MacGoff*, 647 F.2d at 191 ("some balancing or special sensitivity is required" in view of First Amendment implications of agency subpoena duces tecum directed at newspaper publisher).

[20] *NAACP v. Alabama* and *Gibson v. Florida Legislative Investigation Comm.* make clear that investigative subpoenas that likely abridge First Amendment rights are subject to compelling-interest analysis, regardless of the standard applicable to subpoenas in other contexts. Compelling-interest analysis is particularly appropriate

ment to then demonstrate need and a substantial relationship between the material demanded and a compelling governmental interest provides the requisite safeguard against possible governmental abuse of the grand jury subpoena process to suppress speech.[21]

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where, as here, the subpoena is issued in furtherance of an investigation into the possible commission of a speech-related offense—*e.g.*, obscenity. The subpoenas at issue here are aimed *directly* at respondents' expressive activities—the distribution of sexually oriented books and videotapes. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986) (the strictest level of First Amendment review pertains where "a significant expressive element drew the legal remedy in the first place"). Even if petitioner's view of this case as involving only "incidental" burdens were correct, the government would at least have to demonstrate that any infringement on First Amendment rights was "no greater than is *essential* to the furtherance of [a *substantial* governmental] interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (emphasis added).

[21] The cases relied upon by petitioner are not to the contrary. *See* Pet. Br. at 29. Respondents do not seek exemption from grand jury subpoenas by virtue of their involvement in First Amendment protected activities. *Compare Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (media has no constitutional immunity to restrain trade in news and views); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (same). Respondents contend only that in determining whether, and to what extent, the subpoenas may be enforced, the government's interests must be balanced against their First Amendment rights. This is entirely consistent with this Court's holdings. *See Branzburg v. Hayes*, 408 U.S. at 690-691 (balancing interests and concluding that grand jury questions regarding reporters' contacts with informants would not chill press's First Amendment rights); *Zurcher v. Stanford Daily*, 436 U.S. at 565-566 (reaching same conclusion with regard to searches of newspaper offices pursuant to warrant); *see also New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986) (probable cause standard for search warrant provides adequate protection of First Amendment rights of video store owner). Obviously, the government need make no heightened showing where there is no threat to First Amendment rights. *See Herbert v. Lando*, 441 U.S. 153, 173 (1979) (concluding that "constitutional values will not be threatened" by discovery of journalists' state of mind and editorial process in defamation action); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 193 (press is not immune from labor law that "ends in no restraint upon expression or in any other evil outlawed by [the First Amendment's] terms and purposes"); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) (same).

B. There Are Numerous Ways in Which a Subpoena Issued in Connection With a Grand Jury's Investigation of Possible Violations of Obscenity Laws Could Abridge the Recipient's First Amendment Rights.

1. *Subpoenas of Expressive Materials.*

Demands for production of specified sexually oriented expressive materials, without a prior finding that they are (or are likely to be) obscene, raise substantial First Amendment concerns. As the court of appeals concluded below:

> Indiscriminate grand jury subpoenas of protected films could easily convey the impression that erotic or sensual depictions of any sort—including those that are not obscene—open their possessor to criminal prosecution. The fact that a particular film has been subject to subpoena may itself inhibit its display and distribution. The chilling effect of such sweeping and indiscriminate uses of the subpoena power is anything but fanciful; it is altogether real.

884 F.2d at 778.

Grand jury subpoenas are concededly directed toward determining whether a criminal offense has been committed; the grand jury's object is to decide whether, and against whom, an indictment should issue. Thus the threat of prosecution is inherent in the subpoena's issuance, particularly when, as here, the subpoena is obviously directed to the target of the grand jury investigation. A subpoena that demands production of specific expressive materials "puts the distributor and everyone in the community on notice that if they continue to sell such matter, they will be investigated and prosecuted." *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829

F.2d 1291 at 1304 (Wilkenson, J., concurring). As this Court has recognized, because First Amendment freedoms are "delicate and vulnerable," a "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

The line between protected sexually explicit speech and unlawful obscenity is "finely drawn," *Marcus v. Search Warrant of Property*, 367 U.S. at 731, and obscenity is essentially a strict liability offense, *Hamling v. United States*, 418 U.S. at 120-123. If distributors are subjected to subpoenas, indiscriminately directed at specific sexually explicit materials, they will " 'steer far wider' " of the line, inevitably causing the suppression of constitutionally protected speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958). "[I]ndirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." *American Communication Ass'n v. Douds*, 339 U.S. 382, 402 (1950). Government-compelled self-censorship—chilling the distribution of presumptively protected expressive materials—impermissibly "suppress[es] First Amendment liberties." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). The fact that the "practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *FEC v. Massachusetts Citizens for Life*, 107 S. Ct. 616, 626 (1986). *See, e.g., Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988).[22]

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[22] The constitutional infirmity is exacerbated by the fact that the chilling effect not only causes the distributor to curtail his own First Amendment rights, but also results in the curtailment of the First Amendment rights of producers of expressive materials the subpoena recipient would otherwise have distributed. Although "[t]here is no specific constitutional inhibition against making the distributors of *food* the strictest censors of their merchandise, . . . the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the *bookseller*." *Smith v. California*, 361 U.S. at 152-153 (emphasis added).

In an area where "[t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools," *Speiser v. Randall*, 357 U.S. at 525, a grand jury subpoena directed at specific sexually explicit materials must be utilized only where the government's compelling interest necessitates this investigative technique.

2. *Subpoenas of Materials That Relate to Expressive Activities.*

Grand jury subopenas requesting production of the corporate records of businesses engaged in expressive activities may also abridge First Amendment rights.[23] This Court has repeatedly recognized that compelled production of business records may implicate First Amendment rights. *See, e.g., Fisher v. United States*, 425 U.S. 391, 401 (1976) (private financial information sought through IRS summons may receive First Amendment protection); *United States v. Miller*, 425 U.S. 435, 444 n.6 (1976) (First Amendment rights may be implicated by the summons of bank records); *NAACP v. Alabama*, 357 U.S. 449 (1958) (compelled production of organization's membership lists threatens First Amendment right to free association); *Roberts v. Pollard*, 393 U.S. 14 (1968) (*per curiam*), *summarily affirming* 283 F. Supp. 248 (E.D. Ark.) (three-judge court) (enforcement of a subpoena duces tecum requiring production of bank records would violate free association rights).[24]

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[23] Petitioner's argument that "[t]he First Amendment does not ordinarily protect routine corporate business records," Pet. Br. at 28, is beside the point. The question is not whether the documents themselves are constitutionally protected; the issue is whether enforcement of the subpoena requesting the documents infringes upon respondents' constitutionally protected expressive activities.

[24] *See also, e.g., In re Grand Jury Subpoena to First Nat'l Bank, Englewood, Colo.*, 701 F.2d 115 (10th Cir. 1983) (grand jury sub-

Subpoenas directed at business records that relate directly to specified expressive materials suspected of constituting obscenity could obviously have an impermissible chilling effect on the exercise of the recipient's First Amendment rights. Such a subpoena is not different, in effect, from one demanding production of the specific expressive materials themselves. Implicit in a subpoena to produce all records relating to the purchase or sale of a particular videotape, for example,[25] is a threat of prose-

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poena of bank records of antitax organization would impermissibly chill First Amendment right to free association).

The cases cited by petitioner are not to the contrary. *See* Pet. Br. at 28 n.22. In three of the four cases, the court found, *on the facts before it*, that the recipient of the subpoena or summons had not demonstrated that compelled production of its corporate documents would likely abridge its First Amendment rights. *See United States v. Coates*, 692 F.2d 629, 633 (9th Cir. 1982) (holding that IRS "examination of [church's] corporate minute books for purpose of reviewing whether a church qualifies for tax exempt status does not result in 'excessive entanglement' "); *United States v. Grayson*, 656 F.2d 1070 (5th Cir. 1981) (concluding that church had produced no evidence that IRS administrative summons of its bank records would chill its congregation's free exercise rights), *cert. denied*, 455 U.S. 920 (1982); *United States v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979) (holding that IRS request for church records to assess tax exempt status does not constitute impermissible entanglement and church had made no showing that disclosure would pose actual or potential prejudice to right of congregants to freedom of association). In the fourth case, the court concluded that there was no First Amendment right involved at all. *See In re A Witness Before the Special October 1981 Grand Jury (Manner)*, 722 F.2d 349, 353 (7th Cir. 1983) (finding no right of association implicated in relationship between physician and patients).

[25] The subpoena issued to *amicus* by a grand jury sitting in the Western District of Kentucky demands production of all records concerning the acquisition of 10 named videotapes and 9 named magazines, "including but not limited to, contracts, memoranda, invoices, purchase orders, telegrams, telexes, letters, returned checks, money orders, bills of lading, accounting records including computer information" and "[c]opies of all catalogs and brochures regarding the sale and distribution of [those specified] material[s]." The

cution of that videotape which could cause a prudent distributor to cease distribution of that expressive material, even if he believes it is constitutionally protected. *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. at 68 ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."). Petitioner implicitly acknowledges that if compelled compliance with the subpoenas at issue here would chill respondents' exercise of free expression, the First Amendment would be violated. *See* Pet. Br. at 28.

3. *Subpoenas of Business Records.*

Even if the subpoena recipient is not chilled by the express or implicit threat of prosecution, grand jury subpoenas of business records may effectively abridge the exercise of First Amendment rights. If a subpoena for corporate documents is so broad and all-encompassing as to impinge significantly upon the recipient's practical ability to engage in expressive activities, the First Amendment prohibition against prior restraints would be implicated. *Cf. Roaden v. Kentucky*, 413 U.S. 496 (1973) (state may not close theater by warrantless seizure of film). This Court recognized in *Zurcher v. Stanford Daily*, 436 U.S. at 566, that a search of newspaper offices that "actually interfere[s] with the timely publication of a newspaper" would constitute an impermissible "restraint" on the newspaper's constitutional right to communicate, even if the newspaper did not fear prosecution. Clearly, the First Amendment prohibits grand jury subpoenas that have the same effect.

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subpoena also demands production of "all records" reflecting information about professionals who reviewed and/or rendered opinions about the 10 videotapes and 9 magazines, including documentation reflecting their opinions.

For these reasons, once a subpoena recipient makes a prima facie showing that enforcement of the subpoena would likely infringe its First Amendment rights in one of these ways, the burden shifts to the government to demonstrate that the infringement is necessary to further a compelling governmental interest and there is a substantial relationship between the information sought and a legitimate governmental goal.

C. Because the Court of Appeals Did Not Address Issues Necessary to Analyze Respondents' First Amendment Challenge, Remand Is the Proper Course.

The initial step in this inquiry is to determine whether respondents' First Amendment rights are implicated by the grand jury subpoenas. Respondents argued below and before this Court that the compelled production of their corporate documents to the grand jury would infringe their First Amendment rights. But because the court of appeals did not find it necessary to reach respondents' First Amendment challenge to this aspect of the subpoenas, the court did not address the likelihood that enforcement would abridge respondents' constitutional rights. Thus, the record on appeal is devoid of the court's judgment whether respondents have made a sufficient showing that their First Amendment rights would be abridged to shift the burden of justifying the subpoenas to the government. In the absence of such a finding, this Court should not address respondents' First Amendment challenge in the first instance. Remand is the proper course. *See, e.g., United States v. United Continental Tuna Corp.*, 425 U.S. 164, 182 (1976) (remanding to consider issue not addressed by the court of appeals); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957) (Court does not ordinarily consider questions not specifically passed upon by the lower court).

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. In the alternative, the judgment of the Court of Appeals for the Fourth Circuit should be affirmed, or, at the very least, remanded for consideration of respondents' First Amendment claims.

Respectfully submitted,

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August 31, 1990

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